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Office of the Assistant Attorney General

Washington, D.C. 20530

May 14, 2014

The Honorable Carl Levin  
Chairman  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Buck McKeon  
Chairman  
Committee on Armed Services  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Bob Goodlatte  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Dear Messrs. Chairmen:

We are submitting herewith, in consultation with the Department of Defense, the report required by Section 1039 of the National Defense Authorization Act for Fiscal Year 2014.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Peter J. Kadzik  
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable James M. Inhofe  
Ranking Minority Member  
Senate Committee on Armed Services

The Honorable Charles E. Grassley  
Ranking Minority Member  
Senate Committee on the Judiciary  
The Honorable Adam Smith  
Ranking Minority Member

House Committee on Armed Services

The Honorable John Conyers, Jr.  
Ranking Minority Member  
House Committee on the Judiciary

The Honorable Chuck Hagel  
Secretary of Defense

**Report Pursuant to Section 1039 of the  
National Defense Authorization Act for Fiscal Year 2014**

**May 14, 2014**

**Introduction**

The Attorney General, in consultation with the Secretary of Defense, hereby submits this report pursuant to section 1039 of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 (2013). Section 1039(b)(1) seeks an assessment of whether relocation of a detainee currently held at the detention facility at Guantanamo Bay, Cuba, into the United States could result in eligibility for: “(A) relief from removal from the United States, including pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (B) any required release from immigration detention, including pursuant to the decision of the Supreme Court in *Zadvydas v. Davis*; (C) asylum or withholding of removal; or (D) any additional constitutional right.”

As required under section 1039, this report considers whether a Guantanamo detainee relocated to the United States could be eligible for certain forms of relief from removal or release from immigration detention or could have related constitutional rights.<sup>1</sup> The analysis provided below demonstrates that existing statutory safeguards and executive and congressional authorities provide robust protection of the national security.

Historically, the courts have treated detainees held under the laws of war who are brought to the United States as outside the reach of the immigration laws. In addition to the relevant case law, Congress separately has the authority to expressly provide by statute that the immigration laws generally, or the particular forms of relief identified in section 1039(b)(1)(A)-(C), are inapplicable to any Guantanamo detainees held in the United States pursuant to the Authorization for Use of Military Force (“AUMF”)<sup>2</sup> as informed by the laws of war. The AUMF provides authority to detain these individuals within the United States and transfer them out of the United States. Assuming that detainees are held in the United States by the Department of Defense pursuant to the AUMF, and that the immigration laws do not apply to their detention or subsequent transfer abroad, Guantanamo detainees relocated to the United States would not have a right to obtain the relief described in section 1039(b)(1)(A)-(C).

Even in a scenario where a relocated Guantanamo detainee were in removal proceedings under the Immigration and Nationality Act (“INA”), there are numerous bars to the relief identified in section 1039(b)(1)(A)-(C). As described in greater detail below, the INA and

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<sup>1</sup> This report focuses on the specific information sought by the reporting requirements in section 1039 and does not purport to address all issues presented by, or that may arise from, the relocation of detainees from Guantanamo to the United States.

<sup>2</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001) (50 U.S.C. § 1541 note); *see also* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (10 U.S.C. § 801 note).

federal regulations include various bars to obtaining relief on national security and other grounds, and provide legal authority to hold a detainee in immigration detention pending removal. We are not aware of any case law, statute, or constitutional provision that would require the United States to grant any Guantanamo detainee the right to remain permanently in the United States, and Congress could, moreover, enact legislation explicitly providing that no such statutory right exists.

## 1. Asylum

No Guantanamo detainee relocated to the United States would have a right to receive a grant of asylum in the United States. Asylum is a discretionary form of relief generally available to an alien who demonstrates, *inter alia*, that he was persecuted or has a well-founded fear of persecution in his country of nationality on account of his actual or imputed race, religion, nationality, membership in a particular social group, or political opinion.<sup>3</sup> Although an alien who is physically present in the United States may, with limited exceptions,<sup>4</sup> file an application for asylum, that application may be denied as a matter of discretion even if the alien were able to satisfy the eligibility requirements. With respect to those eligibility requirements, there are a number of bars to asylum relief. For example, an alien who has engaged in terrorist activity as described in INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), is ineligible for asylum. An alien is also barred from obtaining asylum where he has ordered, incited, assisted, or otherwise participated in persecution on account of a protected ground or where there are reasonable grounds for regarding the alien as a danger to the security of the United States. Additionally, where an alien, having been convicted of a particularly serious crime, poses a danger to the community or where there are “serious reasons for believing that the alien has committed a serious nonpolitical crime” outside the United States, the alien is also barred from receiving asylum.<sup>5</sup>

Asylum applications are generally assessed through an individualized, case-by-case determination by the Department of Homeland Security (“DHS”) or an immigration court; however, a determination regarding asylum could be made with respect to a category of aliens (such as individuals formerly detained at Guantanamo).<sup>6</sup> Thus, for example, the Executive Branch could promulgate a regulation that would bar Guantanamo detainees relocated to the

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<sup>3</sup> See generally INA §§ 101(a)(42), 208, 8 U.S.C. §§ 1101(a)(42), 1158 (2012); 8 C.F.R. §§ 208.13(b), 1208.13(b) (2013).

<sup>4</sup> See INA § 208(a)(2), 8 U.S.C. § 1158(a)(2).

<sup>5</sup> The bars to asylum are listed at INA § 208(b)(2)(A)(i)-(vi), 8 U.S.C. § 1158(b)(2)(A)(i)-(vi). See also INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (excluding persecutors from refugee definition). Once evidence indicates the applicability of a bar to asylum, the alien bears the burden of proving its inapplicability by a preponderance of the evidence. 8 C.F.R. § 1240.8(d).

<sup>6</sup> See INA § 103(a), (g), 8 U.S.C. § 1103(a), (g) (describing the immigration authorities of the Attorney General and the Secretary of Homeland Security).

United States from receiving asylum.<sup>7</sup> Alternatively, Congress could enact legislation to that effect.

## 2. Withholding of Removal

Section 1039 asks about withholding of removal under the INA, which is a statutory form of protection from removal that is available only when individuals are placed into proceedings under that statute.<sup>8</sup> This protection is rooted in the United States' *non-refoulement* obligations under the 1967 Protocol relating to the Status of Refugees.<sup>9</sup> Pursuant to that treaty, the United States is obligated not to return an individual (with some exceptions noted below) to a territory where his life or freedom would be threatened because of his race, religion, nationality, membership in a particular social group, or political opinion (the five "protected grounds").<sup>10</sup> In order to prevail on a claim for withholding of removal, the applicant bears the burden of showing that it is more likely than not that were he removed to the country designated for removal, he would be persecuted on account of one of the protected grounds. Withholding of removal limits only the government's ability to remove an alien to the specific country or countries where the threat to life or freedom exists,<sup>11</sup> and thus would not prevent removal of a detainee to a third country where no such threat is posed.<sup>12</sup>

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<sup>7</sup> The INA also gives the Executive Branch the authority to put in place other limitations and conditions for asylum. See INA § 208(b)(2)(C), 8 U.S.C. § 1158(b)(2)(C) ("The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)."); see also *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001) (observing that "[e]ven if a statutory scheme requires individualized determinations . . . the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority") (quotation omitted). Since 2003, the Secretary of Homeland Security has also had the authority to issue asylum regulations. See 6 U.S.C. §§ 202, 271, 557; INA § 103(a)(1), (3), 8 U.S.C. § 1103(a)(1), (3).

<sup>8</sup> INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). Statutory withholding under the INA is only applicable once an alien is physically present in the United States and subject to a removal order, whether or not he has been formally admitted under the immigration laws.

<sup>9</sup> 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) (incorporating Article 33 of the 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954)); see also INA § 241(b)(3), 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16. Although the United States is not a party to the 1951 Convention, it became a party to the 1967 Protocol, which incorporates all of the substantive provisions of the Convention, in 1968.

<sup>10</sup> Assuming that a relocated detainee were being transferred to a foreign country pursuant to AUMF authorities and not immigration authorities, the implementing mechanisms under the INA and federal regulations would be inapplicable. The United States could employ an alternate mechanism based on the existing inter-agency process, discussed below, for addressing torture and other humane treatment concerns with respect to detainees relocated from Guantanamo.

<sup>11</sup> See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419-20 (1999).

<sup>12</sup> 8 C.F.R. § 1208.16(f).

An alien who has engaged in terrorist activity, as defined in the INA, is ineligible for withholding of removal under the INA.<sup>13</sup> An alien is also barred from the remedy of withholding of removal (1) for ordering, inciting, assisting, or otherwise participating in the persecution of others on account of a protected ground; (2) when, having been convicted of a particularly serious crime, the alien poses a danger to the community; (3) where there are serious reasons for believing that the alien committed a serious nonpolitical crime outside of the United States; or (4) where there are reasonable grounds to believe that the alien is a danger to the security of the United States.<sup>14</sup> Unlike asylum, if an alien is eligible for withholding of removal, it cannot be denied as a matter of discretion, but the individual can be removed to a third country, consistent with our *non-refoulement* obligations.

### 3. Convention Against Torture (“CAT”)

Section 1039 also asks about relief from removal under the immigration laws, including pursuant to the CAT. Focusing on the CAT, under article 3 of the Convention, as implemented through immigration regulations, the United States may not return an alien to a country where he is “more likely than not” to be tortured. The United States already applies this standard as a matter of policy to all transfers from Guantanamo, pursuant to an existing inter-agency process.<sup>15</sup> Federal law does not provide for judicial review of the United States’ compliance with its CAT *non-refoulement* obligations except in immigration cases arising out of review of a final order of removal under the INA.<sup>16</sup> Thus, existing law contains no provision for judicial review of the

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<sup>13</sup> See INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (cross referencing to grounds of deportation based on terrorist activity in INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B), which, in turn, refers to the terrorism-related inadmissibility grounds in INA § 212(a)(3)(B), (F), 8 U.S.C. § 1182(a)(3)(B), (F)).

<sup>14</sup> See INA § 241(b)(3)(B)(i)-(iv), 8 U.S.C. § 1231(b)(3)(B)(i)-(iv); 8 C.F.R. § 1208.16(d)(2). The INA specifies that an alien described in section 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) – which then references INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), rendering inadmissible aliens engaged in terrorist activity – will be considered a danger to the security of the United States and thus barred. Where the evidence indicates that one of these bars applies, the alien has the burden of proving its inapplicability by a preponderance of the evidence. 8 C.F.R. § 1208.16(d)(2).

<sup>15</sup> See, e.g., Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681, 2681-822 (8 U.S.C.A. § 1231 note) (“It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”). Since the Guantanamo Bay detention facility opened in 2002, more than 500 detainees have been transferred to other countries for repatriation or resettlement. Since 2009, these transfers have been effectuated through a thorough inter-agency process that considers various factors, including whether the threat the detainee may pose can be sufficiently mitigated, as well as whether the transfer can be conducted consistent with our humane treatment policy. The United States would continue to apply such a process with respect to detainees held in the United States.

<sup>16</sup> See FARRA div. G, § 2242(d) (8 U.S.C.A. § 1231 note); *Kiyemba v. Obama*, 561 F.3d 509, 514-15 (D.C. Cir. 2009) (“Congress limited judicial review under the Convention to claims raised in a challenge to a final order of removal . . . Here the detainees are not challenging a final order of removal. As a consequence, they cannot succeed on their claims under the FARR Act.”).

merits of CAT claims filed by Guantanamo detainees relocated to the United States and detained pursuant to the AUMF, as informed by the laws of war.

Even if a Guantanamo detainee relocated to the United States were placed in removal proceedings, and were eligible for one of the forms of CAT protection, the detainee could be removed to any country that did not trigger such protection. Immigration regulations provide two types of CAT-related protection: withholding of removal and deferral of removal.<sup>17</sup> Such protection bars removal only to the country or countries in which it is shown to be more likely than not that the individual would be tortured, allowing for removal to a third country. Thus, if a Guantanamo detainee relocated to the United States were placed in removal proceedings, and were eligible for one of these forms of CAT protection, the detainee could nonetheless be removed to any country where there is no showing that it is more likely than not that the individual would be tortured.

The bars that apply to withholding of removal under the INA<sup>18</sup> also apply to withholding of removal under the CAT regulations.<sup>19</sup> As discussed above, these bars include engaging in terrorist activity, as well as involvement in serious criminal activity. Deferral of removal, by contrast, is not subject to any bars based on the conduct of the applicant; thus, an individual eligible for CAT protection but ineligible for withholding of removal would be granted deferral of removal.<sup>20</sup> However, even if deferral of removal is granted, the United States may, as noted above, effect removal to any third country if there is no showing that it is more likely than not that the individual would be tortured in that country. Additionally, DHS could seek termination of deferral if additional evidence relevant to the possibility of torture becomes available.<sup>21</sup> The United States could also consider whether to pursue diplomatic assurances and other measures related to humane treatment with the goal of addressing concerns and ensuring that the United States satisfies its treaty obligations and its humane treatment policy.<sup>22</sup>

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<sup>17</sup> The regulations regarding the availability of CAT withholding and deferral of removal may be found at 8 C.F.R. §§ 208.16-208.18, 1208.16-1208.18. Deferral of removal is available to aliens who are “subject to the provisions for mandatory denial of withholding of removal,” but who nonetheless are at risk of torture if removed to a particular country. 8 C.F.R. §§ 208.17(a), 1208.17(a). More so than withholding, deferral is a temporary form of protection that can be more easily and quickly terminated if circumstances change.

<sup>18</sup> INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).

<sup>19</sup> See FARRA div. G, § 2242(c) (8 U.S.C.A. § 1231 note); 8 C.F.R. § 1208.16(d)(2). For both withholding and deferral, the burden of proof rests with the applicant to show that it is more likely than not that he would be tortured if removed to a particular country. 8 C.F.R. § 1208.16(b), (c)(2).

<sup>20</sup> 8 C.F.R. § 1208.17(a).

<sup>21</sup> See 8 C.F.R. §§ 208.17(d), 1208.17(d).

<sup>22</sup> The immigration regulations implementing the United States’ obligations under article 3 of the CAT provide that the United States may attempt to obtain credible diplomatic assurances from the government of the specific country at issue that the alien would not be tortured if removed to that country. See 8 C.F.R. §§ 208.18(c), 1208.18(c). Upon receipt of diplomatic assurances obtained by the Secretary of State, the Secretary of Homeland Security “shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien’s removal to that country consistent with Article 3 of the [CAT].” *Id.*; see 8 C.F.R. §§ 208.18(c),

#### 4. Possible Rights to Release from Immigration Detention and Related Constitutional Rights

As explained above, assuming that detainees are held in the United States by the Department of Defense pursuant to the AUMF, as informed by the laws of war, and that the immigration laws do not apply to their detention and subsequent transfer from the United States, Guantanamo detainees relocated to the United States would not have a right to a grant of the relief described in section 1039(b)(1)(A)-(C). In light of the focus in section 1039 on certain forms of relief from removal or release from immigration detention, however, we assume for purposes of this subsection of the report that a detainee relocated to the United States from Guantanamo is being held in immigration detention in the United States, pending the individual's removal under the INA. Such an alien could be detained under one of several different INA provisions pending a determination of his removability.<sup>23</sup>

Detention during the pendency of removal efforts is generally governed by sections 236(a), 236(c), and 235(b) of the INA. Aliens detained during routine section 240 removal proceedings will typically be detained under INA § 236(a), 8 U.S.C. § 1226(a), which grants DHS the authority to detain or release the alien on bond pending a final removal determination. DHS's decision to detain an alien or release that alien on bond is subject to redetermination by the Attorney General.<sup>24</sup>

Under certain circumstances, DHS may also invoke the more narrowly tailored detention provisions under sections 235(b) or 236(c) of the INA, 8 U.S.C. §§ 1225(b), 1226(c). Certain criminal aliens or aliens who engaged in terrorist activity are subject to detention under INA § 236(c), 8 U.S.C. § 1226(c). Aliens detained under that section can only be released in limited circumstances where necessary to provide protection to a witness, and where the alien satisfies the Secretary of Homeland Security that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."<sup>25</sup> Additionally, section

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1208.18(c). With the enactment of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2273, and subsequent amendments, Pub. L. No 108-7, div. L, 117 Stat. 531, 526-32 (2003), the Secretary of Homeland Security has assumed the former authorities of the Attorney General relating to diplomatic assurances in removal cases. See generally 6 U.S.C. §§ 202, 251, 551, 557; INA § 103(a), 8 U.S.C. § 1103(a).

<sup>23</sup> See INA § 235(b)(1)(B)(iii)(IV), (b)(2)(A), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), (b)(2)(A) (detention of certain applicants for admission); INA § 236(a), (c), 8 U.S.C. § 1226(a), (c) (detention while removal proceedings are pending).

<sup>24</sup> At a bond re-determination hearing under INA § 236(a), 8 U.S.C. § 1226(a), the Attorney General must be satisfied that the alien does not pose a danger to the community, or a risk of flight, if released. The Attorney General has broad discretion in bond proceedings to determine whether to release an alien on bond. See *Matter of D-J-*, 23 I. & N. Dec. 572, 575 (AG 2003). Bond hearings are conducted by immigration judges, to whom the Attorney General has delegated the authority to conduct such hearings, and whose decisions can be appealed to the Board of Immigration Appeals (Board). 8 C.F.R. § 1003.19(f). The Board's decisions can then be referred to the Attorney General for review. 8 C.F.R. § 1003.1(h).

<sup>25</sup> INA § 236(c)(2), 8 U.S.C. § 1226(c)(2). In applying section 236(c), some courts have held that bond hearings are required in circumstances where an extended period of time has passed. See, e.g., *Ly v. Hansen*, 351 F.3d 263, 270-

235(b) of the INA, 8 U.S.C. § 1225(b), provides for the detention of aliens intercepted at the border and other aliens subject to expedited removal under INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i).

Once a removal order has become final, Congress has mandated detention of certain criminal aliens, and aliens who have engaged in terrorist activity, during the ninety-day removal period following a final order of removal.<sup>26</sup> After that period expires, the government has discretionary authority to continue detention,<sup>27</sup> during which time the government could continue to seek suitable removal arrangements. In *Zadvydas v. Davis*, the Supreme Court construed INA § 241(a)(6), 8 U.S.C. § 1231(a)(6), which by its text allows for detention of aliens beyond the ordinary ninety-day removal period, to contain a presumptive six-month limit on detention if there is “no significant likelihood of removal in the reasonably foreseeable future.”<sup>28</sup> The Court reached this result based in part on its conclusion that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem.”<sup>29</sup>

A relocated Guantanamo detainee, if held in immigration detention in the United States, might cite *Zadvydas* or *Clark v. Martinez*,<sup>30</sup> in an effort to challenge his continued immigration detention after six months if removal were not significantly likely in the reasonably foreseeable future.<sup>31</sup> The Supreme Court specifically noted in *Zadvydas*, however, that its decision did not preclude longer periods of detention in cases of “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”<sup>32</sup>

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71 (6th Cir. 2003) (declining to set a “bright-line time limitation” but requiring bond hearing when length of detention is unreasonable); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233-34 (3d Cir. 2011) (same); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1139, 1144 (9th Cir. 2013) (affirming preliminary injunction requiring bond hearings). An individual in immigration custody who disputes that he is properly categorized as an alien subject to section 236(c) may do so in a proceeding before the Secretary of Homeland Security and in a hearing before the Attorney General. *See* 8 C.F.R. § 1003.19(a), (b), (h)(2)(ii); 8 C.F.R. § 236.1(c)(10), (d)(1); *Matter of Joseph*, 22 I. & N. Dec. 799, 805 (BIA 1999).

<sup>26</sup> INA § 241(a)(2), 8 U.S.C. § 1231(a)(2).

<sup>27</sup> *See* INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (providing that an inadmissible alien, an alien subject to detention under INA § 241(a)(2), 8 U.S.C. § 1231(a)(2), or an alien determined to be a risk to the community or unlikely to comply with a removal order, “may be detained beyond the removal period”); *see also* INA § 242(b)(8), 8 U.S.C. § 1252(b)(8) (instructing that INA judicial review provisions do not preclude continued detention of alien challenging removal order).

<sup>28</sup> 533 U.S. 678, 701 (2001).

<sup>29</sup> *Id.* at 690.

<sup>30</sup> 543 U.S. 371, 386 (2005).

<sup>31</sup> In *Martinez*, the Court extended its *Zadvydas* 180-day statutory construction reasoning to inadmissible aliens. *Id.* at 385-86.

<sup>32</sup> 533 U.S. at 696. The government has implemented this aspect of *Zadvydas* through the promulgation of regulations that interpret section 241(a) and provide for further detention with respect to certain aliens, including

Moreover, following the *Zadvydas* ruling, Congress expressly provided for detention during removal proceedings and beyond the presumptive six-month period of aliens who have been certified as endangering national security if their removal is unlikely in the reasonably foreseeable future. Section 236A of the INA, 8 U.S.C. § 1226a, authorizes the detention of an alien where it is certified that there are reasonable grounds to believe that the alien meets the terrorist grounds of removal or is “engaged in any other activity that endangers the national security of the United States.”<sup>33</sup>

It is important to note that *Zadvydas* and *Martinez* address detention of individuals in the immigration removal context, and do not speak to the length of detention permissible for Guantanamo detainees who may be relocated to the United States and held under the AUMF, as informed by the laws of war. The Supreme Court in *Hamdi v. Rumsfeld*, which post-dates *Zadvydas*, made clear that detention pursuant to the laws of war is authorized for the duration of the conflict in which the detainee was captured.<sup>34</sup> Indeed, in the law of war setting, national security interests are paramount, the continued detention of enemy belligerents serves that compelling purpose, and deference to military judgments is substantial.

In general, any constitutional rights applicable in a particular context for a Guantanamo detainee relocated to the United States should be no greater than those that would normally apply to a similarly situated alien present in the United States in that same context. For example, if any relocated Guantanamo detainee were placed in immigration removal proceedings in the United States, he should enjoy no greater constitutional rights than other similarly situated aliens in the immigration removal context. Similarly, if a relocated Guantanamo detainee were subject to criminal proceedings in the United States, the same criminal trial rights would apply as for any other alien defendant in such a trial. As discussed above, there are a number of statutory provisions that should render Guantanamo detainees relocated to the United States inadmissible under the immigration laws. Such inadmissible aliens should generally have a limited set of statutory and constitutional rights, even when they are physically present in the United States.

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aliens who pose a threat to national security. See 8 C.F.R. § 241.14. No court has held that the government lacks statutory authority to further detain individuals who pose a threat to national security, consistent with *Zadvydas*, though courts have differed on their views of the statutory authority for these regulations as applied in other circumstances. Compare *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1256-57 (10th Cir. 2008) (upholding the regulations), *cert. denied*, 558 U.S. 1092 (2009), with *Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008) (finding continued detention of a specially dangerous mentally ill alien under 8 C.F.R. § 241.14(f) to be beyond the authority provided in the INA, while noting that Congress resolved the extended detention issue in national security cases in section 236A of the INA), and *Tuan Thai v. Ashcroft*, 366 F.3d 790, 798-99 (9th Cir.) (same), *reh'g en banc denied*, 389 F.3d 967 (9th Cir. 2004).

<sup>33</sup> The detention authority under section 236A of the INA, 8 U.S.C. § 1226a, has not previously been exercised. See also *Martinez*, 543 U.S. at 379 n.4, 386 n.8 (noting that interpretation of the statute in *Zadvydas* did not affect the detention of alien terrorists because sustained detention of alien terrorists is authorized by different statutory provisions – INA § 236A, 8 U.S.C. § 1226a, and the Alien Terrorist Removal Court provisions in INA § 507(b)(2)(C), 8 U.S.C. § 1537(b)(2)(C)).

<sup>34</sup> 542 U.S. 507, 521 (2004) (plurality).

Detainees in the United States, like detainees at Guantanamo, will have the right to maintain actions challenging their detention through writs of habeas corpus. For aliens detained under the AUMF, any arguably applicable constitutional provisions should be construed consistent with the individuals' status as detainees held pursuant to the laws of war, and the government's national security and foreign policy interests and judgments should be accorded great weight and deference by the courts.<sup>35</sup>

## Conclusion

Most of the questions posed by the section 1039 report requirement concern relief relating to immigration detention or removal. If, however, detainees are held in the United States by the Department of Defense pursuant to the AUMF, as informed by the laws of war, and the immigration framework does not apply to their detention or subsequent transfer abroad, Guantanamo detainees relocated to the United States would not have a right to obtain the relief described in section 1039(b)(1)(A)-(C). Congress could, moreover, expressly preclude those forms of relief by statute. Even if such relief were available, the immigration-related relief described in section 1039(b)(1)(A)-(C) is circumscribed by a variety of statutory and executive authorities that provide robust protection of our national security.

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<sup>35</sup> See *Boumediene v. Bush*, 553 U.S. 723, 796-97 (2008) (“In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches.”); see also *Hamdi*, 542 U.S. at 531 (plurality) (recognizing, in evaluating habeas corpus procedures in law of war detention context, that “[w]ithout doubt, our Constitution recognizes that core strategic matters of waramaking belong in the hands of those who are best positioned and most politically accountable for making them”); *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts “to intrude upon the authority of the Executive in military and national security affairs”).